STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-687

March 17, 2003

PUBLIC UTILITIES COMMISSION
Proposed Amendments to Chapters 280, 285 and 288

ORDER ADOPTING AMENDMENTS TO RULES AND STATEMENT OF FACTUAL AND POLICY BASIS

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

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I. SUMMARY

In this rulemaking, we adopt amendments to Chapters 280 (Provision of Competitive Telecommunications Services), 285 (Maine Telecommunications Education Access Fund, or MTEAF) and 288 (Maine Universal Service Fund, or MUSF). All of these amendments are related to facilitating the implementation of the High Cost Universal Service Fund (also known as the Maine Universal Service Fund or MUSF) and the ongoing administration of the MTEAF.

The purpose of the amendments to Chapter 280 is to make clear the obligations of Maine local exchange carriers to implement access rates that comply with the requirements of 35-A M.R.S.A § 7101-B (the "access parity" statute) and to establish a schedule for that compliance.

The purpose of the amendments to Chapter 285 is to make the Rule conform to several provisions of an administrative nature that are contained in Chapter 288, which was enacted more recently. The same Administrator administers both the MTEAF and the MUSF. Under the amendments, the contribution obligations under both Funds will apply to exactly the same group of contributors. Contributors will make payments into each Fund quarterly, and the methods of calculating the amounts each contributor must pay into each Fund will be consistent under both Chapters.

The purposes of the amendments to Chapter 288 are to establish an application process, to clarify the obligations of recipients to establish access rates that are no higher than their interstate access rates (consistent with the proposed amendments to Chapter 280), to make clear that assessments apply only to retail revenues (rather than all intrastate revenues), and to clarify the time periods for revenue reporting by contributors.

In the Rulemaking, comments were filed by AT&T[1], Community Service Telephone Company (CST), NEP, LLC (NEP), the Public Advocate, the Telephone Association of Maine (TAM), Unitel, Verizon, Verizon Wireless, and WorldCom, Inc. We address these comments in this Order.

II. ISSUES BEYOND THE SCOPE OF THIS RULEMAKING

Several commenters have proposed a number of changes to existing provisions of Chapters 285 and 288 that we did not propose to change in the NOR. These proposed changes are beyond the scope of this Rulemaking. Making such changes most probably would violate the rulemaking provisions of the Maine Administrative Procedure Act (APA), 5 M.R.S.A. §§ 8051-8064, and might deny due process to other persons affected by the Rule.

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[1] The comments are filed by AT&T (which we assume is a corporate parent rather than by the operating utility in Maine, AT&T of New England.

The fundamental problem with considering issues not described in the Notice is that other persons, who might have had an interest in commenting on a proposed change, have no opportunity to do so because they were never provided notice of such a possible change. The notice requirement of 5 M.R.S.A. § 8053(3)(D) states that an agency must provide detailed notice of all provisions of a "proposed rule." At the time of adoption of a rule, 5 M.R.S.A. §§ 8052(5) and (5)(B) require agencies to justify any deviations from the proposal. While these provisions all speak in terms of a "proposed rule," necessarily, in the context of a rulemaking that proposes to amend an existing rule, we must read these provisions as referring to the "proposed amendments."[2]

We note an agency may, when it determines that it intends to adopt a rule (or amendment) that is "substantially different" than that proposed, provide notice of that

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[2] The relevant provisions are shown below in redline (or "legislative format") *as if* they were written to apply to amendments to existing rules rather than proposed original rules. The hypothetical "additions" are underlined and "deletions" stricken.

> **3. Contents of notice.** The notice shall:
> …
>
> D. If possible, contain the express terms of the proposed amendments to the rule or otherwise describe the substance of the proposed ~~rule~~amendments, stating the subjects and issues involved …

5 M.R.S.A. § 8053(3)(D).

> **5. Written statement adopted.** At the time of adoption of any amendments to a rule, the agency shall adopt a written statement explaining the factual and policy basis for the ~~rule~~amendments. … The agency shall address the specific comments and concerns expressed about any proposed amendments to the rule and state its rationale for adopting any changes from the proposed ~~rule~~amendments, failing to adopt the suggested changes or drawing findings and recommendations that differ from those expressed about the proposed ~~rule~~amendments.

5 M.R.S.A. § 8052(5).

> B. Amendments to ~~A~~a rule may not be adopted unless the adopted ~~rule is~~amendments are consistent with the terms of the proposed ~~rule~~amendments, except to the extent that the agency determines that it is necessary to address concerns raised in comments about the proposed ~~rule~~amendments, or specific findings are made supporting changes to the proposed~~rule~~ amendments.

5 M.R.S.A. § 8052(5)(B).

intent and request further comments. *See* 5 M.R.S.A. § 8052(5)(A). We decline to do so in this case.

The issues raised by commenters that we cannot consider because we did not propose changes in the NOR to the provisions in question are:

- ? Verizon Wireless's argument that mobile telecommunications carriers should not be required to contribute to the Maine Universal Service Fund. We settled this issue in the original Chapter 288 rulemaking and did not propose to change the policy in this Rulemaking.[3]

- ? NEP's argument that one-way paging providers should not be required contribute to the MUSF. We settled this issue in the original Chapter 288 rulemaking.[4]

- ? NEP's argument that providers of e-mail service should be required to contribute to the MUSF (and, presumably, the MTEAF).

- ? The argument by Verizon Wireless (and possibly the Public Advocate) that we should require all applicants for USF to undergo a rate proceeding prior to receiving USF.[5]

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[3] We note, however, 35-A M.R.S.A. § 7104 does not appear to allow any discretion in the matter. Subsection 3 states:

> The commission shall adopt rules to implement this section and may require providers of intrastate telecommunications services to contribute to a state universal service fund… .

Contrary to arguments by NEP and Verizon Wireless, the word "may" refers to discretion to establish a universal service fund. Once established, the Commission does not have discretion to exempt certain categories of "providers of intrastate telecommunications services."

[4] *See* footnote 3 above. NEP's additional argument that one-way paging providers should not be required to contribute to the MTEAF is most likely also beyond the scope of this Rulemaking. Nevertheless, we have considered NEP's arguments at Part IV.A.2 below because we did propose an amendment to Chapter 285 that was intended to clarify and add greater specificity to the existing term "contributing telecommunications carrier." That term was previously defined as "any telecommunications carrier offering telecommunications services in Maine." It now states explicitly the carriers, including "paging providers" that are included in that category.

[5] Chapter 288, § 3(C)(1) does require approximately half of the rural ILECs to undergo a rate proceeding prior to receiving USF. In Part V.C below, we explain again

- ? Unitel's argument that we should reconsider whether Chapter 288 should require USF recipients to raise their local exchange rates to Verizon levels.

- ? TAM's request to modify the surcharge provisions of Chapter 288 to provide an option for carriers to impose a flat per-line surcharge instead of the percentage surcharge presently allowed.[6]

III. CHAPTER 280 AMENDMENTS

A. Interpretation and Requirements of 35-A M.R.S.A. § 7101-B

During the fall of 2002, some independent incumbent local exchange carriers expressed uncertainty about the need and timing for them to implement access rates that comply with the requirements of 35-A M.R.S.A. § 7101-B (the access parity statute). As explained below, some of the uncertainty may have been caused by prior Commission orders.

(as we did in the OAR that adopted the original Rule) when this provision requires such proceedings.

[6] In the first Chapter 288 rulemaking, *Maine Public Utilities Commission, State Universal Service Fund for Local Exchange Carriers*, Docket No. 2001-230, Order Adopting Rule (July 18, 2001) at 13, we stated reasons why would not permit a flat surcharge.

We note that we see a substantial difference between TAM's alternative flat surcharge proposal and a change we made in response to a comment complaining about a different existing provision that we did not propose to change. As discussed at Part V.F below, we have modified Section 5(A) of Chapter 288, which requires contributors to the MUSF to provide notice to customers that they have contributed. We modified the existing provision by adding other alternative forms of notice while retaining the original form. We made the change in response to comments by AT&T, even though we did not propose any change to the existing provision. We justified the change on the ground that we retained the original provision as an alternative form of notice, so that carriers that did not receive notice of a possible change would still be able to use the original notice. Customers (like other carriers) would not have received notice of either potential change. The TAM alternative surcharge, however, even though the existing surcharge would still be available, would have a far greater impact on customers than would the alternative forms of notice. A flat-rate surcharge would increase the amount that customers with relatively lower bills would pay and decrease the amount for customers with relatively higher bills. By contrast, the alternative forms of notice of contributions would have little impact on customers. All are reasonably informative.

35-A M.R.S.A. § 7101-B states:

> Notwithstanding any other provision of law, the commission by May 30, 1999 shall establish and every 2 years reestablish intrastate access rates that are less than or equal to interstate access rates established by the Federal Communications Commission.

Recently, in *Public Utilities Commission, Investigation of the Rate Design of Community Service Telephone Company*, Docket No. 2001-827, Order Rejecting Stipulation (November 13, 2003) (*"CST Order")*, we addressed a prior interpretation of the statute. The prior interpretation stated that LECs could establish intrastate access rates that would produce the same amount of intrastate revenue as the interstate revenue they received from the National Exchange Carriers Association (NECA)("NECA disbursements").

A provision allowing LECs to use NECA disbursements first appeared in this Chapter at section 8(J). It permitted a carrier, for the May 30, 1999 access rate filing *only*, to file intrastate access rates "that mirror the structure and level of interstate access rates (or interstate NECA-pool disbursements)." The Order in the rulemaking that adopted section 8(J) contained no discussion about the provision. *Public Utilities Commission, Proposed Amendment of Chapter 280 to Achieve Parity with interstate Access Rates By May 30, 1999*, Docket No. 97-319, Order Adopting Rule (Dec. 3, 1997).[7] A later order described our rationale for allowing the use of NECA disbursements, rather than actual NECA rates, on the ground that "ITCs *could have* withdrawn from the NECA pool and filed their own interstate access rates, mirrored those rates on the intrastate side, and argued that they had complied with the letter of the law." *Maine Public Utilities Commission, Investigation into Rates Pursuant to 35-A M.R.S.A. § 7101-B*, Docket Nos. 98-891 et al., Interim Order at 3-4 (Jan. 28, 1999) (*Interim Order*) (emphasis added). That Order also stated, however, that it was the Commission's "objective," by May of *2001*, that intrastate access *rates* should not exceed interstate access *rates*.

NECA's disbursements to individual pool participants are based on the participants' costs, but its rates are averaged. NECA files a single set of averaged access tariffs on behalf of local exchange carriers that belong to NECA. It pools the access revenues and pays participating carriers based on those carriers' actual costs or

[7] CST's Supplemental Memorandum (filed in support of its motion to reconsider the *CST Order* and in this Rulemaking, and discussed in detail below) quotes a statement in the Docket No. 97-319 Order that discussed the "disbursement" theory. The statement was solely a description of comments filed by the Telephone Association of Maine in that Rulemaking, as indicated by three sentences that begin "TAM notes," "TAM states," and "TAM states. The Commission stated only that "We agree that there are a number of technical and structural issues that will have to be evaluated in order to properly mirror the structure and level of federal interstate access rates," but the Order never endorsed the merits of the theory.

pursuant to an average schedule formula. Thus, some carriers contribute more in interstate access revenues than they receive in disbursements; others contribute less than they receive. Most of Maine's rural incumbent local exchange carriers (ILECs) are in the latter category. If those carriers chose to establish intrastate access rates that were designed to produce the same amount of intrastate revenue as the interstate revenues they receive as NECA disbursements, their intrastate rates would necessarily exceed their interstate rates (the averaged rate filed by NECA).

In the *CST Order*, we ruled that there was "no legal justification for continuing to allow access rates to be set at disbursement levels," and stated that the statute was "clear on its face." The statute states that the Commission must establish "intrastate access *rates* that are less than or equal to interstate access *rates*." (emphases added). As we stated in *CST*, the access parity statute does not say that access rates must be less than or equal to "interstate access rates that could have been approved by the FCC, whether filed and approved or not."

CST has requested the Commission to reconsider the *CST Order* and has filed supporting memoranda. On January 23, 2003, it filed a written request in this rulemaking requesting the Commission also to consider the memoranda filed in the *CST* case in the Rulemaking. We have considered CST's arguments, and find that they are without merit.[8] We therefore adopt the changes to Chapter 280 essentially as proposed, although we make minor changes for administrative reasons.

Before addressing CST's arguments in detail, we observe that all the arguments attempt only to justify an interpretation of the access parity statute that we rejected in the *CST Order* and proposed to reject in this Rulemaking, i.e., that the statute permits intrastate *rates* to be set to raise the same amount of revenue as interstate *disbursements.* CST never argues that the interpretation we proposed in this Rulemaking is legally erroneous or an abuse of discretion.[9] CST argues only that its preferred reading is also legally justifiable.

CST points out that although the Legislature defined "intrastate access rates," it did not define "interstate access rates." CST finds significance in this omission, i.e., a suggestion that the Legislature "recognized that what constitutes 'interstate access rates' is not so explicitly clear." "Intrastate access rates" are defined as "*rates* that a telecommunications service provider pays for access to a local exchange carrier's facilities and services in order to provide intrastate interexchange service." Significantly, the word "rates" itself is not defined. It needs no further definition because the word is so widely understood. The definition makes no attempt to define what a "rate" is.

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[8] In addition to substantive arguments presented at the end of CST's January 15, 2003 memorandum, which we address here, CST claims procedural errors that relate solely to the CST case. We will consider those arguments in the *CST* case.

[9] CST apparently believes the Commission has discretion to adopt either interpretation.

Instead, it identifies a subset of rates – an "access" rate. It describes *who* pays "access" rates to *whom* for *what* purpose. Although a sense of parallelism might suggest that a definition of "interstate access rates" might be worthwhile (if for no other reason than to prevent future litigants from attempting to read too much significance into the absence of such a definition), there can be little doubt that interstate access *rates* are the same thing as their Maine intrastate counterparts: they are the *rates* that *interstate* interexchange carriers *pay* "for access to a local exchange carrier's facilities and services in order to provide [*interstate*] interexchange service." Indeed, because of the comparison that the Commission must draw ("less than or equal to") between intrastate *rates* and interstate *rates*, it is highly unlikely that the Legislature intended that interstate rates mean something entirely different than their intrastate counterpart. We do not see the same significance in the Legislature's failure to provide a definition of "interstate access rates" as CST does.

A rate is a price that customers (including access customers) pay to carriers for a specified quantity of service. Access rates are normally priced on a per-minute basis. CST's argument that the "revenues" or "payments" (or "disbursements" from NECA) that it receives are somehow equivalent to rates must fail. Rates are only one factor of revenues; rates must be multiplied by units of sale (e.g., minutes) to produce revenues. In the case of NECA "disbursements," revenues are even further removed from rates. NECA is a pooling arrangement under which a large number of carriers combine their access revenues. NECA then pays the revenues to the participating carriers on a basis unrelated to the rate, i.e., according to carriers' costs.

CST next argues that there was an "understanding" that "ITC *revenues* to be received for being interstate access providers were found in the *payments* that they received not necessarily from the IXCs, but from the NECA Pool, i.e., the NECA Pool Disbursements" (emphasis added). CST does not identify who had this understanding or the time period during which it existed, beyond a statement that it was "recognized" in Section 8(J). The understanding is irrelevant for at least two reasons. First, Section 8(J) has expired by its own terms; it applied only to the required 1999 access reduction. Four years ago, in the *Interim Order*, the Commission signaled that any such understanding was limited in time. Second, any prior understanding about "revenues," "payments," and a comparison between the two, misses the point that the statute talks about *rates*. That there may have been an "understanding" also fails to address the merits of what we proposed in this Rulemaking (and previously ruled in the CST case) – to apply the statute according the ordinary meaning of its words.

CST next argues that because the statute requires the Commission to establish intrastate access rates that are:

> less than or equal to interstate access rates established by the Federal Communications Commission, the Legislature clearly intended that there be some room for discretion from the Commission. If the Legislature had intended that interstate … NECA Tariff No. 5 rates alone (without the associated revenues provided in the NECA Pool Disbursements) would have been the maximum level

> for intrastate rates, the Legislature would likely not have considered it necessary to confer broad discretion on the Commission to set rates below that level. Rather, … it becomes more likely that the Legislature intended that the maximum level of intrastate access rates be set at the more conservative NECA Pool Disbursement level … .

CST appears to be arguing that the downside discretion granted by the Legislature would be a useless act if the Legislature meant (as it said) that intrastate access *rates* could not be higher than interstate access *rates*. Therefore, in order to make the discretion meaningful, the Legislature must have "intended" to say something it didn't say – that intrastate rates could be much higher than the interstate rates it specified, i.e., as high as interstate *disbursements.* Aside from the obvious rule of statutory construction that it is not necessary to determine legislative intent when the wording of the statute is plain and unambiguous, the factual premise of CST's argument is erroneous. At the time the statute was passed, the downside discretion was clearly meaningful. There was ample room below existing interstate access rates. The discretion granted by the statute would have permitted the Commission to establish intrastate access rates that were a meaningful amount less than their interstate counterparts. We see no merit to CST's argument.

CST states that the Commission's actions in adopting former Section 8(J)[10] and in the *Interim Order* are consistent with the "expectation" described above. This is an observation, not an argument. Even if correct, it does not address the merits of the issue. That we previously may have supported an alternative view is not particularly relevant to whether we should continue to do so. We now read the statute to preclude the use of NECA disbursements as a means of justifying (and backing into) a Maine access rate that exceeds the interstate rate. We do not agree with CST that we have a choice between two alternative rulings. While we recognize that it may conflict with the approach in Section 8(J) that allowed ILECs on a temporary basis to reduce their access charges only to the disbursement level, we stated in the CST *Order Rejecting Stipulation* and we continue to believe that "there is no legal justification for continuing to allowing access rates to be set at disbursement levels." In addition, the purpose of the access parity statute was to eliminate a potential impediment to interexchange carriers reducing their intrastate toll rates to the level of their interstate toll rates. Since the disbursement alternative leaves those carriers paying more for intrastate access than for interstate access, interpreting the statute to allow that alternative is inconsistent with the purpose of the statute.

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[10] CST's Supplemental Memorandum in several places implies, and at page 5 expressly states, that Section 8(J) is still in effect. CST is incorrect. As pointed out in the *CST Order*, Section 8)(J) by its own terms applied only to access rate filings for 1999. It therefore has expired, despite the continued inclusion of its language in Chapter 280. Language in a Rule can be removed only through a rulemaking.

For all of the foregoing reasons, we reject CST's arguments. It is not necessary to consider any of the policy arguments that CST has made in support of its preferred reading.

B. Adopted Amendments to Chapter 280

Beyond the arguments that the Commission is not required by law to mandate that local exchange carriers reduce their access rates to interstate levels, and should not do so for policy reasons (which we have rejected above), no commenter objected to the proposed requirement that all LECs reduce their access rates to interstate levels by May 30, 2003.

Because of concerns about the implementation dates of access rate changes and of USF funding, we decide, for reasons of administrative convenience, that we will modify the date for changing access rates to June 1, 2003 and June 1 of all odd-numbered years thereafter. See further discussion below.

We also are aware of pending legislation (L.D. 265) that may change the deadline for compliance, and have included provisions that will accommodate possible changes in the law. Section 8(B) , as finally adopted, requires local exchange carriers to establish intrastate access rates that are "less than or equal to the most recent interstate rates for that carrier that became effective on or before June 1" of the year required by the statute "or such other date as may be established by statute." That requirement will be mandatory for all local exchange carriers on June 1, 2003 "or such later date that may be established by statute," and every two years thereafter "except to the extent that the need for subsequent changes is modified by statute." As finally amended, Section 8(B) also makes clear that the Commission, in its discretion, may require access reductions to interstate levels prior to any extended date established by statute (which we understand is proposed to be in 2005), if such reductions are consistent with the legislation. We have made complementary changes to Chapter 288, § 3(C)(2), which governs requirements that carriers must comply with in order to receive USF.

In a section of its comments that do not appear to apply specifically to any one of the three Rules being amended, the Public Advocate argues that the Commission should "continue" to require full revenue requirement proceedings whenever a LEC must increase local rates to meet the requirements of the access parity statute. The USF Rule, Chapter 288, § 3(C)(1), requires such proceedings but only if the LEC has applied for USF and only if it has not had a rate case completed case within 6 months prior to the effective date of the Rule, i.e., after January 29, 2001. This requirement was in the original Chapter 288, and we proposed no change to that provision. For the reasons we explained in Part II above, the issue of the Chapter 288 provision is outside the scope of this Rulemaking.

Nevertheless, as described above, we did propose changes to Chapter 280 that made specific the requirement that all LECs must reduce access rates to interstate levels during 2003. We believe it is reasonably within the scope of the Rulemaking for a commenter to propose a change to the Chapter 280 proposal that would require revenue requirement proceedings for any LEC that proposed to increase local rates in conjunction with reducing its access rates. We do not agree, however, that we should make the proposed change. We share the Public Advocate's concern that local rate increases be minimized. We do not agree, however, that it is necessary to conduct revenue requirement proceeding for every carrier that must reduce its access rates, particularly if the carrier has had a relatively recent rate proceeding.

Chapter 288, of course, addresses much of the Public Advocate's concern. Approximately half of Maine's rural ILECs have not undergone rate proceedings that ended after January 29, 2001. All of those companies must have a rate proceeding if they apply for USF. (Five of those companies have rate proceedings pending.) We believe we should address those companies that have had rate proceedings prior to January 29, 2001, and that do not apply for USF, on a case-by-case basis. Chances are good that such companies will themselves file rate cases if the required access reductions are sufficiently great. The Public Advocate, and any other person, may make a preliminary showing that a rate case is necessary.[11]

Proposed subsections 8(B)[12] and 8(C)contained provisions that would establish dates prior to May 30, 2003 that would require compliance with the access parity requirement by certain categories of LECs. We received little comment about the dates contained in proposed subsections B and C. We nevertheless decide that we will not adopt these provisions, however, because of a comment we received concerning a "working capital" issue that arose under the USF Rule due to the fact that contributors might have to make payments to the USF prior to being able to impose a USF surcharge on their customers. We discuss the working capital issue in detail below in Part V.G.

The Public Advocate stated that the rural LECs should not be required to reduce access rates prior to May 30, 2003 for administrative and rate stability reasons. Unitel stated that it would be prepared to reduce access rates by April 1, 2003 to interstate

[11] Approximately half of the rural ILECs have had rate proceedings that ended after January 29, 2001. Those companies were not required, under the Rule, to have new rate cases in order to receive USF. We have recently completed a number of proceedings for those companies in which the portion of their access rates that exceed interstate rates will be converted to a combination of USF and higher local rates. Notwithstanding the Public Advocate's apparent argument that *all* rural LECs that increase local rates must undergo a new rate proceeding, the Public Advocate participated in the recent conversion proceedings and agreed to the results even though there were no examinations of revenue requirements.

[12] Proposed subsection B is not the same as adopted subsection B, which is essentially subsection D, with modifications.

levels that were effective in July of 2002. Under proposed Section 8(B)(2), Unitel would have been required to reduce access rates only to 2000 levels prior to May 30, 2003, but it stated that it preferred to reduce access rates only once.[13] We received no other comment on the various "schedule" alternatives. Because of the working capital issue, discussed in detail at Part V.G below, we decide that no rural ILEC will be required to reduce its access rates until June 1, 2003. It is therefore not necessary to discuss the Public Advocate and Unitel comments.

Proposed Section 8(C) would have applied to a third category of LECs, i.e., "all other." This category includes Verizon and all competitive LECs (CLECs). The proposed provision stated that this group of LECs must implement rates that are less than or equal to their interstate rates for 2000 within 30 days after the effective date of the amendments. We had no reason to believe there were any carriers in this category that were not in compliance already. The provision is now unnecessary because all LECs are now subject to the requirements of subsection B.

Proposed subsection D stated that all local exchange carriers, by May 30, 2003, must implement intrastate access rates that are less than or equal to their interstate rates that are in effect on that date, and that they must re-establish such rates every two years thereafter.

Because of our decision that no LEC must change its existing intrastate access rates until June 1, 2003, proposed Subsections B and C are unnecessary. Proposed subsection D becomes Subsection B in the final amendment, and proposed subsection E becomes subsection C. As described above, subection B is modified to accommodate possible changes in the access parity statute.

Pursuant to discussions with several ILECs concerning implementation issues, we have become convinced that requiring access rate changes on May 30 of 2003 (and subsequent odd-numbered years) creates too much of an administrative and billing system burden on those companies. The statute presently states that "the commission by May 30, 1999 shall establish and every 2 years reestablish intrastate access rates that are less than or equal to interstate access rates… ." We believe that there is sufficient flexibility under the present statute to decide that June 1 of every odd-numbered year satisfies the "every 2 years" requirement of the statute. (Section 8(B) will accommodate possible changes in the statute.) We have made the same change in Chapter 288.

Section 8 adopted by this Order replaces existing section 8 in its entirety. Existing section 8 already contained a provision (subsection 8(J)(3)) stating that subsections A, B, C, D, E, G and H of Section 8 expired on May 30, 1999. We retained the substance of former subsection F (the bar against access charges that apply directly

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[13] Subsequent to the filing of its comments, the parties in Unitel's proceedings have agreed that Unitel would reduce its access rates on June 1, 2003.

to end-users) in a new subsection C (proposed in the Rulemaking as subsection E). We have deleted existing subsections I (which required an access rate reduction in 1997) and J (which addressed the access reductions required for 1999 and therefore expired).

IV. AMENDMENTS TO CHAPTER 285

Chapter 285 governs contributions to and payments from the Maine Telecommunications Education Access Fund (MTEAF) to qualified schools and libraries. In this Rulemaking, we have addressed issues on the contribution side, particularly the relationship between this Rule and Chapter 288, which governs the Maine Universal Service Fund (MUSF). 35-A M.R.S.A § 7104-B, which required the Commission to establish the MTEAF, also requires the Commission to "integrate the collection of the charge with any state universal service fund developed by the commission." Through the amendments, we intend to make collection of the contributions of the two Funds as similar as possible in order to make collection more efficient and convenient both for contributors and for the Administrator, who administers both Funds.

A. Amendments to Definitions

1. Uniformity of Contribution Requirement With Chapter 288

We proposed amendments to the definition of "Contributing Telecommunications Carrier" in Section 1(A) to make as clear as possible that the "telecommunications carriers" that must contribute to each Fund are the same. Amended Section 1(A) now refers specifically to interexchange carriers (IXCs), local exchange carriers (LECs), mobile telecommunications carriers and paging providers. We recognize that sections 7104 (USF) and 7104-B define who must contribute to each Fund somewhat differently. For example, Section 7104-B (2) and (8) refer to "telecommunications providers" and "other entities" (such as cable television companies and internet service providers) that the Commission determines offer two-way "interactive communications services comparable to those offered by telecommunications providers." By contrast, section 7104(3) requires contributions from "providers of intrastate telecommunications service," stating specifically that this category includes "providers of radio paging service and mobile telecommunications services."

Notwithstanding these different formulations, we believe they are intended to describe essentially the same potential group of contributors, and, at least for the present, we intend that the entities that contribute to each Fund will be the same. Although the current version of Chapter 285 does not specifically mention paging providers and mobile telecommunications carriers, they clearly are telecommunications providers within the meaning of that Chapter 285 (and section 7104-B), and those carriers have been contributing to the MTEAF.

2. Applicability of Contribution Requirement to One-Way Pagers

NEP, which is a paging provider, argues that we should not apply the MTEAF to one-way paging providers.[14] NEP's argument is almost certainly outside the scope of this Rulemaking. We believe that paging companies are already subject to assessment for the MTEAF because they are "telecommunications carriers." We proposed only a clarifying amendment that specifically refers to paging companies (and other categories). NEP did not even mention the proposed amendment and apparently believes it is presently included as a "telecommunications carrier," as it has paid MTEAF assessments without protest. Nevertheless, because we did propose the amendment, we will address the substance of NEP's comments.

35-A M.R.S.A. § 7104-B(2) states that "the commission shall…require all telecommunications carriers offering telecommunications services in the State and other entities identified by the commission pursuant to subsection 8 to contribute to the fund." NEP's argument is based on the language of subsection 8 of 35-A M.R.S.A. § 7104-B, which describes the "other" entities the Commission must require to contribute upon the requisite finding – that these other entities (e.g., cable companies and internet service providers (ISPs), both specifically identified) are offering "2-way interactive" services "comparable" to those offered by "telecommunications carriers." NEP argues that we should find that "telecommunications carriers," as used in subsection 2, are impliedly limited to two-way carriers (which would exclude NEP) because of the subsection 8 provision that requires the Commission to assess "other" entities that offer two-way service.

We do not agree. The fact that subsection 8 contains a two-way comparability provision does not mean that the general category of "telecommunications carriers" described in subsection 2 necessarily must exclude telecommunications carriers that offer only one-way communications. (The Legislature may have selected that particular comparison because two-way carriage is obviously more prevalent than one-way and, in particular, the expected mode that cable companies and ISPs might provide.) In any event, "telecommunications carrier" is defined in section 7104-B as having the same meaning as under 47 U.S.C. § 153. Subsection 44 of that section states:

> The term "telecommunications carrier" means any provider of telecommunications services…."

47 U.S.C. § 153(43) defines "telecommunications":

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[14] NEP also argues that we should not require it to contribute to the USF. At Part II above, we ruled that consideration of such an issue would be beyond the scope of this Rulemaking. See footnotes 3 and 4.

> The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

NEP and other paging providers (whether one-way or two-way) clearly are telecommunications carriers under this definition. They fall into the “main” category of “telecommunications carriers” under 35-A M.R.S.A. § 7104-B, subsection 2 rather than the “other” category described in subsection 2 (“other entities identified by the commission pursuant to subsection 8”). Under 35-A M.R.S.A. § 7104-B(2), the Commission *must* require NEP to contribute.

3. <u>Inclusion of Cable Companies and ISPs as Contributors</u>

TAM appears to suggest that the Commission should presently declare that cable companies must contribute to the MTEAF. TAM specifically refers to the “pilot” telephone service provided by Time Warner in the Portland area. Unitel makes a similar comment, stating also that (ISPs) should be included. Both TAM and Unitel seem to assume that the Commission may make blanket declarations that cable companies and ISPs should contribute. Whether a cable company or an ISP is offering telecommunications services is a factual question. 35-A M.R.S.A. § 7104-B(8) (restated in Section 1(A) of the Rule) requires the Commission to assess entities that offer “2-way interactive communication services comparable to those offered by telecommunications carriers.” If such an entity applies to the Commission for authority to provide telephone service as a telephone utility, the fact is necessarily established. Time Warner Cable Information Services Maine, LLC did apply, and we recently granted authority to provide local exchange service in Docket No. 2002-792. Time Warner will contribute to both the MTEAF and USF.

If a cable company or ISP that is apparently providing telephone service does not apply for authority, we believe it will be necessary for the Commission to make a factual finding for each such entity. To date, other than the Time Warner service, we are not aware of, and no one has brought to our attention, allegations that any cable company or ISP offers two-way interactive communications. If credible allegations are made, we will investigate and if necessary, conduct adjudicatory proceedings to make the necessary factual determinations.[15]

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[15] Although TAM and Unitel raised the issue of contributions by cable companies and ISPs only to the MTEAF, the same considerations would apply to the MUSF. If there is proof, and a finding by the Commission that a cable company or ISP is acting as an intrastate local exchange or interexchange carrier (each of which is defined in Chapter 288), it will be required to contribute to the MUSF.

4. Other Amendments to Definitions

We also proposed to amend Section 1(A) to state that the contribution requirement applies only to those carriers that had revenues of $12,500 or more during the previous quarter. This same limitation was already contained in the USF Rule. At present, the Administrator receives a large number of very small checks (less than $10) from a large number of MTEAF contributors. The total amount of revenue from those contributors is quite small, but creates a significant administrative burden for the contributors and the Administrator. We also propose to state this limitation in Section 2(A) of the Rule. No commenter opposed the proposed limitation, and we adopt it.

We proposed new definitions of "mobile telecommunications carrier" and "radio paging service provider" (Sections 1(C) and 1(F) in the final amendments) because of the use of those terms in Section 1(A). The proposed definitions are identical to those presently in Chapter 288. No commenter opposed the proposed definitions and we adopt them.

Finally, we add a new definition of "intrastate retail revenue" in Section 1(B) that is identical to its counterpart in Chapter 288, § 2(G). Such a definition is necessary to make clear what revenues are subject and not subject to assessment. We address specific comments raised by several commenters concerning the inclusion of uncollected revenue at Part VI.A below.

B. Amendments to Section 2

The limitation in Section 2(A) of the contribution requirement to telecommunications providers with $12,500 in revenues in the previous quarter is discussed above in connection with Section 1(A). We also proposed to make clear that the assessment applies to "billed intrastate retail revenues" and to replace the statutory term "retail charges" with that phrase. (We proposed the same change for the definition in Section 1(A).) We proposed a similar amendment to the USF Rule, so that assessments will apply to the same amount of revenues under each Fund. Several commenters objected to these amendments. We address those comments in Part VI.A below. Finally, we proposed to eliminate the phrase "excluding interstate toll or interstate private line services" (which is derived from 35-A M.R.S.A § 7104-B) because we have proposed to make the contribution requirement apply to "intrastate" revenues, thereby making the interstate exclusions redundant. No commenter objected to that proposed change, and we make it.

In Section 2(B), we proposed to require contributors to pay a specified percentage of their intrastate retail revenues rather than a percentage of "retail charges to be collected." This change (if it is actually a change) will place the MTEAF on the same basis as the USF. We also proposed that the Administrator add an amount for amounts that cannot be collected from contributing telecommunications providers. This provision is identical to the uncollectible provision contained in the USF Rule, except for recognition that, under the MTEAF statute, the maximum that may be collected from contributors is 0.5%. If the MTEAF contribution level is set at the maximum amount, it is not possible to have an uncollectible factor. There were no comments about this proposal, and we adopt it, but with slight modifications. Upon further consideration, it is not clear that an uncollectible factor will always be necessary because, at present, contributors report and remit. There are no bills that some of them do not pay and, therefore, no uncollected bills in the usual sense. The provision is therefore modified to make an uncollectible factor discretionary, upon approval of the Commission.

We also add new subsection C, which, as proposed, was identical to a provision contained in Chapter 288. It addresses charges by various carriers that apply to both interstate and intrastate service, such as minimum charges that may or may not include a usage allowance. Recently, some carriers have also implemented combined local (definitionally intrastate) and interexchange (interstate and intrastate combined) services. Because of comments received about the proposal and because of our experience under the identical provision in Chapter 288, we have decided to modify the proposed provision in Chapter 285 and the existing provision on Chapter 288. We discuss these issues and the final version of the provisions at Part VI.B below.

Finally, we have amended subsection E to make clear that the existing obligation to turn over all funds collected under the surcharge does not necessarily complete a carrier's payment obligation As discussed above, a contributor's obligation is to pay a certain percentage of billed intrastate retail revenues. We received no comments about the proposed change.

C. <u>Section 3</u>

Section 3 is "new." Most of it was contained in the original Rule, however, as subsections C – E of Section 2. We proposed to split off this portion of Section 2 in order to make clearer the division between the contribution (by telecommunications carriers) and collection (by carriers from retail customers) functions of the Rule. We received no comments about this reorganization and adopt it as proposed.

Although extensively reworded, we intended no substantive change in subsection A (formerly subsection C of Section 2).

Subsection B (which was not found in the original Rule) is identical to an equivalent provision in Chapter 288. It is the retail version of the allocation provision (proposed section 2(C), discussed above) that requires allocation of jurisdictionally mixed, unseparated charges. As proposed this provision stated that a surcharge for the MTEAF could not apply to any such charge unless the carrier obtains approval for an allocation method. We have modified the proposed provision, as described in Part VI.B below.

D. Other Changes

Previous Sections 3 – 5 are renumbered as Sections 4 – 6 to accommodate the addition of "new" Section 3.

V. CHANGES TO CHAPTER 288

A. Definition of Intrastate Revenues; Exclusion of Uncollectibles

We proposed four substantive changes to Chapter 288. The first was to make clear, in section 2(K) (definition of "retail revenue"), that the revenues that are subject to assessment for the USF would be intrastate retail revenues that a carrier "bills" to customers. As discussed above in connection with a similar proposed amendment to Chapter 285, § 2(A), our intent, in part, was to subject the same revenue to assessment under both Rules. We received a number of comments objecting to the inclusion of uncollectibles in the base for assessment. We address these comments at Part VI.A below.

B. Applications for USF; Section 3(B)

The second proposed change was to add an application process in new Section 3(B). We adopt the proposal with one change, discussed below. (Existing sections 3(B) - (G) are re-lettered as 3(C) – (H)). Section 3(B) requires a rural LEC to request funding from the USF and, with the request, to provide certain information that will allow the Commission to convert, on a revenue-neutral basis, the difference between existing higher and future reduced access revenues to USF. As discussed in connection with changes to Chapter 280 above, all LECs, including USF recipients, must reduce intrastate access rates to interstate rate levels by June 1, 2003 (unless the Legislature requires a different date). See also Section 3(C)(2) of Chapter 288, discussed below.

The change to subsection B(3) is based on the Commission's experience with applications for USF it has already received. (These applications of course were not subject to the requirements of *proposed* subsection B.) Some companies used simplifying estimates of billing units for certain access rate elements. Final subsection B(3) states that applicants must provide access billing units and rates for each access rate element, but that, with the approval of the Director of Finance, an applicant may use a reasonable estimate for specified rate elements. Typically, estimates would be permitted only for rate elements that have little effect on total access revenue.

Subsection B also requires carriers whose local rates are not yet at Verizon levels to file a plan for achieving those levels that is consistent with the requirements elsewhere in Section 2. We also adopt a complementary change in Section 2(F) (previously 2(E)) that will require each USF order issued by the Commission to establish a plan for increasing rates to Verizon levels.

C. Need for Rate Cases; Section 3(C)(1)

In many cases, it will also be necessary for a Company to undergo a revenue requirement proceeding prior to receiving USF. Section 3(C)(1) (previously 3(B)(1)) requires such a proceeding if the company has not completed one within 6 months prior to the effective date of Chapter 288, i.e., after January 29, 2001. If a company must have a revenue requirement proceeding, the information required by this provision will be filed with the rate case.

As discussed above in connection with Chapter 280, the Public Advocate argues that the Commission should "continue" to require full revenue requirement proceedings whenever a LEC must increase local rates to meet the requirements of the access parity statute. We addressed this argument in connection with the proposed amendment to Chapter 280, but believe it is outside the scope of the Rulemaking to the extent that the argument applies to Chapter 288. This requirement was in the original Chapter 288, and we did not propose any change to that provision. See Part II above.

Verizon Wireless believes it is "imperative" that Fund recipients only receive amounts that are "absolutely essential" to ensure universal service. Verizon Wireless recognizes that the Rule does require rate proceedings "in some circumstances," but claims the Rule "provides no guidance regarding when a rate case is required."[16] In fact, as discussed above, Section 3(C)(2) clearly requires that a USF applicant must have completed a rate case "no earlier than six months prior to the adoption of this Chapter." Verizon Wireless apparently misunderstands this provison, characterizing it as requiring a rate proceeding "*at least* 'six months prior to the adoption of this Chapter.'" (emphasis added).

To the extent that we can read Verizon Wireless's comments as suggesting the Commission should require rate proceedings for applicants other than those identified in the existing Rule (previously Section 3(B)(2), now 3(C)(2)), the suggestion is beyond the scope of the Rulemaking. See Part II.

D. Compliance With Access Parity Statute By USF Applicants; Section 3(B)(2)

The third change is to redefine the requirement contained in Section 3(C)(2) (previously 3(B)(2)) that requires compliance with the requirements of the access parity statute, 35-A M.R.S.A. § 7101-B. The prior language simply states that carriers seeking USF must implement intrastate access rates that "meet the requirements" of the statute. Because of the uncertainty associated with this statute

[16] Proposed Section 3(B)(2), as published on the Commission's website, referred to Section 3(B)(1), which indeed provides "no guidance." Proposed 3(B)(2) should have referred to Section 3(C)(1), which, both in the original Rule (as 3(B)(1)) and the amended Rule does state the clear standard for when a rate proceeding is required. We apologize for any confusion this error may have caused.

(described in detail above in our discussion of Chapter 280), we make specific (as we have in Chapter 280) the requirement that a carrier's intrastate access rates must be less than or equal to its interstate access rates. We received no comments about this proposal that made any arguments that differed from those made about the Chapter 280 proposal.

Section 3(C)(2)also , by cross-reference to Section 8 of Chapter 280, establishes the effective dates of the interstate access rates to which a LEC's intrastate rates must conform, based on the dates on which the statute (which we recognize may be amended) requires intrastate access rates to be adjusted. As in Chapter 280, § 8(B), Section 3(C)(2) states that, in the event of a statutory change that allows discretion, the Commission may exercise that discretion to require USF applicants to change access rates in conjunction with the receipt of USF.

E. Offsetting Retail Customer Surcharges By IXCs With Access Cost Savings

We requested comment on whether to modify the provision in Section 5(B) that allows contributing carriers to impose a surcharge on their retail customers equal to the "Revenue Percentage" that those carriers must pay into the Fund pursuant to Section 4. We suggested that for interexchange carriers, such a surcharge arguably constitutes a substantial windfall. Many rural LECs (primarily the "amortization" companies that will receive formal funding form the MUSF early in 2003) have access rates that exceed the statutory levels by a substantial amount. By paying those excessive access rates, interexchange carriers have for some time been providing what we have described above as "informal USF." Funding from the MUSF converts informal USF to real USF. It is likely that IXCs will save more money by shedding the informal burden of paying excess access rates (because they have been bearing the entire burden) than they will incur by paying a USF contribution.

We did not specifically propose in this rulemaking to preclude IXCs from imposing a surcharge on their retail customers, but we did seek comment about whether we should add such a provision to the Rule. A draft for such a provision was included as a separate attachment . The draft stated that a carrier that offers interexchange service (whether alone or in conjunction with local service) cannot impose a retail surcharge unless it proves that the burden imposed by its USF contribution exceeds the savings it realizes as a result of lower access rates that are associated with orders allowing USF for rural carriers, i.e., the conversion of informal USF to formal USF.

Verizon and AT&T opposed such a provision. Both argued that access rate reductions are passed on to customers in a competitive toll market. The Public Advocate and TAM supported such a provision, arguing that otherwise IXCs will get double recovery. They don't believe that IXCs will automatically pass through the access reductions in toll rates.

In our Order in *MPUC, Investigation into Verizon's Alternative Form of Regulation*, Docket No. 99-851 (June 25, 2001), we found that the retail interexchange market was competitive and we allowed Verizon to set retail toll rates without regulatory interference. It is a reasonable expectation in competitive markets that prices will decline if costs decline, although we cannot be certain of such a result given other considerations that affect the Maine intrastate retail toll market.

We have stated in previous orders that the retail toll market is competitive. Access rates are only one component of the total cost of providing long distance service. Transport, administration and marketing costs are among the factors considered by carriers in determining their pricing strategy. In addition, there may be considerable difficulty in determining the amount of savings. Approximately half of the ILECs will reduce their access rates to NECA 5 levels on June 1 of this year, and others may do so at various times in the future. Thus, the billing units (originating and terminating minutes and transport miles) and access rates will vary over time for each carrier. In addition, the access charge reductions implemented by Verizon will be different from those of the independent rural LECs, and tracking the billing units to which the rate reductions are applied is not a simple task. Thus, from quarter to quarter, the amount of "savings" could swing dramatically, and calculating the savings could involve substantial administrative difficulty. Accordingly, we will not adopt the proposal that surcharges for IXCs be offset with access charge savings.

The Commission intends to continue to monitor the retail toll market to ensure that access charge savings are passed on to customers through lower toll rates, when appropriate, after considering the various factors that go into toll service pricing. The Commission has authority under §7101(B)(2) to require toll rate reductions in order to reflect reduced access charges, if it finds that "effective competition" does not exist in the retail toll market.[17]

F. <u>Notice to Customers of Contributions By Carriers; Section 5(A)</u>

AT&T states that the Commission "proposes," in Section 5(A), that contributors to the MUSF must include a message on customer bills concerning the amounts that the carrier contributed during the past year. The existing provision is not "proposed." AT&T filed no comments in the original Chapter 288 rulemaking, and no other commenter objected. No other commenter in the current rulemaking objected.

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[17] Unitel proposed that we add a further requirement to any offset provision (which, as discussed above, we do not adopt). Unitel proposes that IXCs be required to substantiate the PIU information they report to access providers (LECs). Such a provision not only is not related to an offset provision, but is really beyond the scope of the USF rule. Such a requirement might be an appropriate subject matter for Chapter 280, but the proposed amendments to Chapter 280 were narrowly limited to access rate reduction requirements. ILECs themselves could presumably initiate an audit of an IXC, or ask, in a different context, the Commission to order one.

We did not propose any change to the existing provision. Nevertheless, AT&T now argues that the "proposed rule goes too far in implementing [35-A M.R.S.A.] Section 7103(3)(E)'s requirement for explicit identification on customer bills of contributions to any state universal service fund …."

The NOR did not propose any change to, or request comments about, this provision. Under the principles stated in Part II, AT&T's comments are beyond the scope of this rulemaking. Nevertheless, we will address the matter because we can retain the original message, so that carriers who have never received notice of any possible change, and who may already have made preparations to comply with the existing provision, may continue to use it. We add alternative messages to satisfy AT&T's concerns.

AT&T argues first that the statutory provision requiring a message is intended to "ensure that carriers are recovering Maine USF contributions from their end-users." We disagree. The statutory provision unambiguously requires "an explicit identification on customer bills of *contributions to* any universal service fund…" (emphasis added).[18] The statute does not mandate recovery by contributors from their customers. In an exercise of Commission discretion, Chapter 288 permits contributors to recover those contributions through a surcharge on their customers. As discussed in the *Order Adopting Rule* for the first Chapter 288 rulemaking,[19] carriers may also recover their USF contribution costs through other rates, provided that any such recovery is not identified on customer bills as a charge for MUSF contributions.

AT&T claims next that even providing a message on an annual basis "would be difficult and costly for AT&T to implement for many of its customers because of billing system constraints." We do not believe that the statute can be interpreted to allow a message on only one out every 12 bills (or four bills in the case of quarterly billing). *Maine Public Utilities Commission, State Universal Service Fund for Local Exchange Carriers*, Docket No. 2001-230, Order Adopting Rule (July 18, 2001).

We do agree with AT&T that the total amount in dollars that a carrier contributed during a prior 12-month period does not provide information that is very useful to customers. We also recognize that having to constantly change the amounts stated in the bill, in order to comply with a requirement that carriers provide information on a rolling year basis, may be unduly burdensome. Accordingly, Section 5(A) now contains five alternative messages, including the original. One of the new alternatives allows a carrier to state a dollar amount for a specifically identified calendar year. Three of the new alternatives allow a carrier to state the percentage of its intrastate retail revenues that it contributed instead of a dollar amount.

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[18] In the first Chapter 288 rulemaking, we stated that the *statutory* requirement to identify *contributions* on bills should not be confused with the *Rule's* requirement that bills must also identify *surcharges* to retail customers.

[19] Docket No. 2001-230, *Order Adopting Rule* at 13.

G. Working Capital

AT&T commented that the Commission must make changes to "proposed provisions of Section 4" of Chapter 288 "to ensure that the carriers are not forced to make payments prior to having the opportunity to recover their MUSF contributions from their customers." AT&T suggests that it should be allowed three months between the date it receives a bill and the date it must pay that bill.

AT&T does not specify which of the "proposed" provisions in Section 4 have any impact on the timing either of bills to or payments by contributors. The proposed changes to Section 4 were minimal and had no effect on the timing of bills or payments. As with other comments by AT&T, it appears that AT&T has not understood which provisions already existed and which were proposed in this Rulemaking. Even the existing provisions of Section 4 (as well as Section 5) do not provide significant detail about the timing of payments and ability to recover the amount a carrier contributes from its customers. Existing Section 4(H) (now 4(J)) stated that payment by contributors was due 30 days after bills were issued by the Administrator, but no provision states when the Administrator must issue the bill. In short, the question of timing of payments and collection from customers is largely beyond the scope of the existing Rules and the scope of this Rulemaking.

This issue is essentially an administrative matter and can be addressed through actions by the Commission, the Commission's Director of Finance and the Fund Administrator. The relevant questions are: when will contributors receive bills and, more importantly, be required to make payments to the Fund; when may contributors file tariffs for USF surcharges that apply to their customers; when will those surcharge tariffs be effective; when will carriers actually receive surcharge revenue; when will USF recipients begin receiving payments (this question is in turn tied to when will they reduce access rates, which is a matter addressed in the Rules); and, most importantly, what are the cash working capital needs of the Funds, which must collect money before they can pay it out.

We believe the following timing guidelines will address the concerns of AT&T and others with regard to cash working capital needs. Potential USF recipients will not be required to reduce access rates prior to June 1, 2003. No USF obligations will exist until June 1, and no payments to USF recipients will be made until during the third quarter of 2003. Carriers have been notified that if they intend to impose a surcharge, they should file tariffs for surcharges as soon as possible. Because Fund requirements for the second quarter will exist only for one month (June), it is necessary for carriers to impose the surcharge at the full Revenue Percentage rate during only one month of the second quarter, presumably May.[20] Contributors will be billed in early

[20] Carriers may also collect the surcharge over a two-month or three-month span, but must reduce the surcharge rate to one-half or one-third, respectively, of the Revenue Percentage.

March, and will not be required to pay until June 30 for the second quarter obligation and September 2 for third quarter obligations.

We believe this plan adequately addresses most legitimate working capital needs of recipients and contributors. For recipients, payment lags are similar to those for access rates, which USF largely replaces. For contributors, there is a considerable payment lag and a reasonable opportunity to recover, through surcharges, much of the amount they must contribute in advance of the time for payment.

This plan does require two changes of an administrative nature to Chapter 288. Original Section 4(I) (now 4(K)) stated that payments to recipients would be monthly. Because we have delayed the time for payment of money into the Fund by contributors, it is necessary to change payments to recipients to a quarterly basis. Recipients will receive full payment for the quarter at the end of each quarter (rather than monthly payments at the end of each month). Recipients are in approximately the same position from a cash working capital perspective. We also have changed Section 4(J) (formerly 4(H)) to state that the Director of Finance shall establish the payment period for contributions after consideration of the cash working capital needs of contributors, recipients and the Fund. The payment period must be at least 30 days. The original Rule specified that payment was due in 30 days, allowing no discretion for later payment. As presently contemplated, carriers will have nearly 120 days to make their first payment and approximately 90 days in each subsequent quarter.

VI. CHANGES APPLICABLE TO BOTH RULES

A. Exclusion of Uncollectibles From Assessment

As discussed in connection with both Chapters 285 and 288, we believed that the existing language in both Rules was not sufficiently precise as to the retail revenues that were subject to assessment. The USF and the MTEAF statutes also do not provide significant guidance. We proposed to define revenues as “billed” revenues. One of our purposes was to obtain timely data. It might take a significant amount of extra time to determine realized revenues. AT&T, Unitel. Verizon, and Verizon Wireless objected to the proposal and argued that revenues subject to assessment should take into account a carrier’s uncollectible experience. No commenter supported the proposed change.

Both AT&T and Verizon argued that the principle of “competitive neutrality,” referenced in both statutes, requires assessments to reflect each carrier’s own uncollectible experience. Verizon argued that, as an ILEC and eligible telecommunications carrier (ETC), its collection efforts are subject to more restrictive Commission policies than non-ETCs and IXCs.

We find these arguments persuasive. We will not allow carriers to report actually achieved revenues because waiting until carriers have determined actually collected revenues would take too long and, as a practical matter, would delay reporting by a whole quarter. Instead, Chapter 285, § 1(B) and Chapter 288, § 2(G) define "intrastate retail revenue" as the amount billed to retail customers less the carrier's factor for uncollectibles. The assessment provisions of each Rule require reporting on the same basis. *See* Chapter 285, § 2(A) and Chapter 288, § 4(C).

B. Allocation of Jurisdictionally Mixed Charges

As discussed in Part IV.B, we proposed to add two new provisions to Chapter 285, which would address the allocation of charges by various carriers that apply to both interstate and intrastate service, such as minimum charges that may or may not include a usage allowance. Recently, some carriers have also implemented combined local (definitionally intrastate) and interexchange (interstate and intrastate combined) services. In the NOR, we stated that one of the goals of the amendments to Chapter 285 was to make "the methods of calculating the amounts each contributor must pay to each Fund … consistent under both Chapters."

Proposed Section 2(C) of Chapter 285 was identical to an existing provision in Chapter 288, § 4(D). It stated that, unless the contributor proposes, and the Commission or the Director of Finance approves, a method for allocating those revenues between intrastate and interstate, the assessment applies to *all* revenues derived from jurisdictionally mixed, unseparated charges; in other words, the entirety of such charges would be considered effectively *intrastate*.

Proposed Section 3(B) of Chapter 288 sought to address the question of how surcharges on retail customers should apply to jurisdictionally mixed charges. It was identical to an existing provision in Chapter 288, § 5(B)(3). Under it, a carrier would normally use the same approved allocation method it used on the contribution side, but if it fails to obtain approval for an allocation method, it could not apply a surcharge to *any* portion of a jurisdictionally mixed charge; in other words, the entirety of such charges would be considered effectively *interstate*.

The two proposed provisions were intended to be complementary and to produce opposite results in the event of default. If, instead, both provisions stated that upon failure of a carrier to obtain approval of an allocation method, jurisdictionally mixed charges would be considered all intrastate on both the collection and surcharge sides, there would be virtually no incentive for a carrier to obtain such approval. In addition, under such a system, both carriers and their customers would over-contribute.

Verizon objected to the proposed assessment provision in Section 2(C), notwithstanding that the same provision already exists in Chapter 288, and that Verizon never objected to it in the original Chapter 288 Rulemaking. (Verizon did not address the proposed *surcharge* provision in Section 3(B) of Chapter 285.) Verizon mischaracterizes the assessment provision as stating that all jurisdictionally mixed revenues "shall be *presumed* to be intrastate *until proven otherwise*" (emphasis added). The provision is actually both more and less than Verizon states. There is no "presumption." The provision instead states that all such revenues *will* be considered intrastate unless a contributor proposes, and the Commission or the Director of Finance approves, an allocation method. On the other hand, there is no burden to "prove" anything, including that a portion of these revenues is interstate. There is a burden only to propose an allocation method. In its comments, Verizon proposes that instead of the proposed provision, the Commission should simply require all carriers to propose and have approved an allocation method.

Our intent with both provisions was to create two powerful incentives for carriers to propose allocation methods. The *Order Adopting Rule* in the original Chapter 288 Rulemaking stated that either minutes of use (MOU) or revenues would be an acceptable method. Only about six potential contributors (not including Verizon) have responded to the existing incentive in Chapter 288, despite a letter sent by the Director of Finance on November 22, 2002, reminding contributors of the need to propose an allocation method and the consequences of failing to do so. We doubt if a mere "requirement," as proposed by Verizon, would be more persuasive than the incentives, which obviously have not worked as intended.

WorldCom objected to both of the proposed amendments to Chapter 285 on the ground that the "proposed treatment of jurisdictionally mixed revenues is fundamentally unfair." Although WorldCom recognized that both provisions already existed in Chapter 288, it urged the Commission to modify those provisions as well. WorldCom states that it would not object to "allocating all of these revenues to intrastate revenues for MTEAF purposes." WorldCom's position is directly contrary to its position in the original Chapter 288 Rulemaking, in which it argued that it was *unlawful* for the Commission to consider all jurisdictionally mixed revenues as intrastate if a contributor failed to have an approved allocation method.

WorldCom goes on to say that if the Commission were to consider all jurisdictionally mixed revenues as intrastate, as it has recommended, carriers should be allowed to impose the retail surcharge to its customers on the same basis. WorldCom claims, however, that the proposed provision "does not allow" it to do so. WorldCom presumably is referring to proposed Section 3(B) (and existing Section 5(B)(3) in Chapter 288). As discussed above, the surcharge provisions are designed to create a further incentive for carriers to obtain approval of an allocation method.

WorldCom's argument suggests that it is not even aware, despite the clear wording of the provisions, that the results to which it objects are not mandatory or automatic. All that WorldCom or any other carrier needs to do to avoid those results is propose a reasonable allocation method. Like Verizon, WorldCom has not done so.

It was not our intent that almost all carriers would have to pay assessments on one hundred percent of the jurisdictionally mixed charges, or that almost all carriers could not impose a surcharge on any portion of such charges. Rather, it was our expectation that carriers would respond to the strong incentives we built into the reporting system and would propose reasonable allocation methods.

While we do not believe that the arguments of Verizon and WorldCom have merit, our experience with the existing provision in Chapter 288 leads us to modify both the proposed provisions in Chapter 285 and the existing provisions in Chapter 288. The Chapter 288 provisions already exist, and we did not propose any change to them. Our discussion in Part II would suggest that we cannot change those provisions because of the lack of notice. We did, however, provide notice that we intended to achieve uniformity between the two Rules. If it is appropriate to modify the proposed provisions in Chapter 285, it follows that it is legally permissible to modify the existing provisions in Chapter 288.

Instead of imposing a somewhat drastic result if carriers do not ask for approval of an allocation method, we establish a default allocation method. Carriers are still free, as under previous Chapter 288 provisions, to impose an alternative allocation method. An advantage to the system we adopt is that it results in a lesser administrative burden both for carriers and the Commission.

The Commission Staff has discussed alternative allocation methods with various carriers. For non-wireless carriers, an allocation based on revenues appears to be more feasible than the obvious alternative, minutes of use. It is also more directly related to the desired end result, an allocation of revenue. (Minutes are only units of sale and ignore the effect of rates.) Carriers using this method must develop a ratio of *directly assigned* intrastate retail revenues to *directly assigned* total retail revenues. "Directly assigned" retail revenues are those that are clearly intrastate or interstate, typically per-minute charges. Necessarily, they do not include the unseparated, jurisdictionally mixed revenues themselves. Reporting carriers will multiply the ratio by the jurisdictionally mixed retail charges and report the result as intrastate retail revenues, along with directly assigned intrastate retail revenues. This default method is contained in Section 2(C)(2) of Chapter 285 and Section 4(D)(2) of Chapter 288. In calculating the surcharge for each customer, carriers will apply the same ratio to jurisdictionally-mixed charges billed to their retail customers. *See* Chapter 285, § 3(B) and Chapter 288, § 5(B)(3).

For mobile telecommunications (wireless) carriers, the default allocation is that contained in the Federal Communications Commission's "safe harbor" method for commercial mobile radio service (CMRS) providers. That allocation is presently 28.5 percent interstate for cellular and PCS providers and 12 percent for paging providers . *See Federal-State Board on Universal Service* et al., CC Docket Nos. 96-45 et al., Report and Order (December 12, 2002) at 13-14. The intrastate percentage will therefore be 71.5 percent for cellular and PCS companies and 88 percent for paging providers. The mobile telecommunications default allocation is stated in Chapter 285, § 2(E)(2) and Chapter 288, § 4(F)(2).

Recently, several interexchange carriers have bundled local exchange service and ancillary services (e.g., call waiting, caller ID and the like) with interexchange (intrastate and interstate) service. Local exchange and ancillary services are definitionally intrastate. Chapter 285, § 2(D)(1) and Chapter 288, § 4(E)(1) each require that the revenues attributable to these services must be deducted from the bundled charges prior to the intrastate-interstate allocation of the remainder of those charges.

The default amounts for these charges are the carrier's stand-alone rates for those services. *See* Section 2(D)(2) of Chapter 285 and Section 4(E)(2) of Chapter 288. If the carrier does not have stand-alone rates, it shall use equivalent Verizon rates. The Director of Finance must approve the use of specific Verizon rates For local service, the Director will accept Rate Group F rates, a composite of Verizon rates (e.g., a weighted average of the rates in all Verizon rate groups),[21] the actual Verizon rates applicable in the locations of the carrier's customers, or any other reasonable methodology.

Verizon Wireless argues we should clear up an "ambiguity" in the Chapter 288 concerning whether services such as "voicemail, three-way calling, caller ID, and the like," when bundled with other services, are subject to assessment. Verizon Wireless claims they are not subject to assessment under the federal USF, and argues that for the MUSF, carriers should be allowed to "apportion" such bundled services in the same way as for Maine as they do for the federal fund. If Verizon Wireless is correct that the federal USF does not assess these revenues, it is difficult to say that they have been "apportioned." Verizon's argument is far from clear, but it is possible that it is arguing that these services should not be subject to MUSF assessment. We disagree. In the first place, we do not think the definitions in former 2(K) (now 2(G) of Chapter 288 (and in new Section 1(B) of Chapter 285) are ambiguous. Both provisions define "intrastate retail revenue" as revenue for "intrastate telecommunications services sold to end-user customers for use by those customers." The services mentioned by Verizon Wireless clearly are "telecommunications services." In addition, as noted above, the default allocation provisions for non-wireless carriers also specifically address these revenues, which must be declared as intrastate.

There is little significance to the fact, if true, that charges for these services are not subject to assessment by the federal USF. They are widely considered intrastate services. They are offered in conjunction with local exchange services rather than interexchange services and are universally included in intrastate tariffs rather than interstate tariffs. Nevertheless, for wireless carriers, we understand that the recently revised safe harbor percentage takes into account that some wireless revenues are attributable to ancillary and local services. Accordingly, Section 2(E)(2) of chapter 285 and Section 4(F)(2) of Chapter 288 provide that the default (FCC safe harbor) applies to all wireless revenue.

[21] We expect that Verizon will propose to abolish rate groups in conjunction with the addition of contiguous exchanges to its basic service calling areas (BSCAs). *See* Rulemaking to Amend Chapter 204, Basic Service Calling Areas, Docket No. 2001-865, Order Adopting Rule (December 10,, 2002) at 5-6.

C. Exclusion of Other Surcharge Revenue From Assessments

Verizon notes that Section 5(B)(2) of Chapter 288 prohibits application of a customer surcharge on other surcharges, e.g., for Enhanced 911, for the MTEAF, "or for similar funds that are not part of a carrier's retail service offerings."[22] Verizon suggests that we apply a similar limitation on the assessment side for both Rules.

In original Chapter 285, Section 2(A) applied assessments to "retail charges for telecommunications services." The NOR proposed to substitute the phrase "intrastate retail revenues for telecommunications services." Original Section 4(C) of Chapter 288 assessed "revenues derived from intrastate telecommunications services provided in Maine and revenues derived from [the intrastate portion of jurisdictionally mixed charges]… ." In the NOR, we proposed to add the modifier "retail" before each use of the word "revenues." Original Section 2(K) of Chapter 288 contained a definition of "retail revenue" as "revenue that a carrier receives for intrastate telecommunications services sold to end-user customers for use by those customers." The definition also contains a specific exclusion for a variety of wholesale services.

It seems doubtful that the language of either provision could ever be construed as applying to the charges identified by Verizon. However, in light of the fact that the surcharge provisions specifically preclude application to this type of charge and the fact that the specific exclusions in the Chapter 288 do not mention this type of charge, we will add a specific exclusion in order to eliminate any possible argument.

It is necessary to add a definition of retail revenue to Chapter 285 in any event to address the uncollectible issue described in Part VI.A above. Both definitions are identical; both exclude other surcharges. They are now labeled "Intrastate Retail Revenue," and are located at Chapter 285, § 1(B) and Chapter 288, § 2(G).

VII. ORDERING PARAGRAPHS

Accordingly, we order

1. That the amendments to Chapter 280, Provision of Competitive Telecommunications Services, Chapter 285, Maine Telecommunications Education Access Fund, and Chapter 288, Maine Universal Service Fund, which are attached, are adopted;

2. That the Administrative Director send a copy of this Order and the attached rule to:

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[22] Verizon characterizes this as a "proposed" provision, but it was in the original Rule and we did not propose to change it.

a. The Office of Public Advocate;

b. The Secretary of State for publication in accordance with 5 M.R.S.A. § 8053(5);

c. The Executive Director of the Legislative Council, State House Station 115, Augusta, Maine 04333 (20 copies).

d. The Administrator of the Maine Telecommunications Education Access Fund and Maine Universal Service Fund

3. That the Administrative Director send notice of this Order and amended rules to:

a. All local exchange carriers, interexchange carriers, mobile telecommunications providers, and paging providers in the State of Maine;

b. All persons included in the service lists for proceedings conducted under this Rule during the past 5 years;

c. All people who have filed with the Commission within the past year a written request for any Notice of Rulemaking.

Dated at Augusta, Maine, this 17th day of March, 2003.

BY ORDER OF THE COMMISSION

____

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.